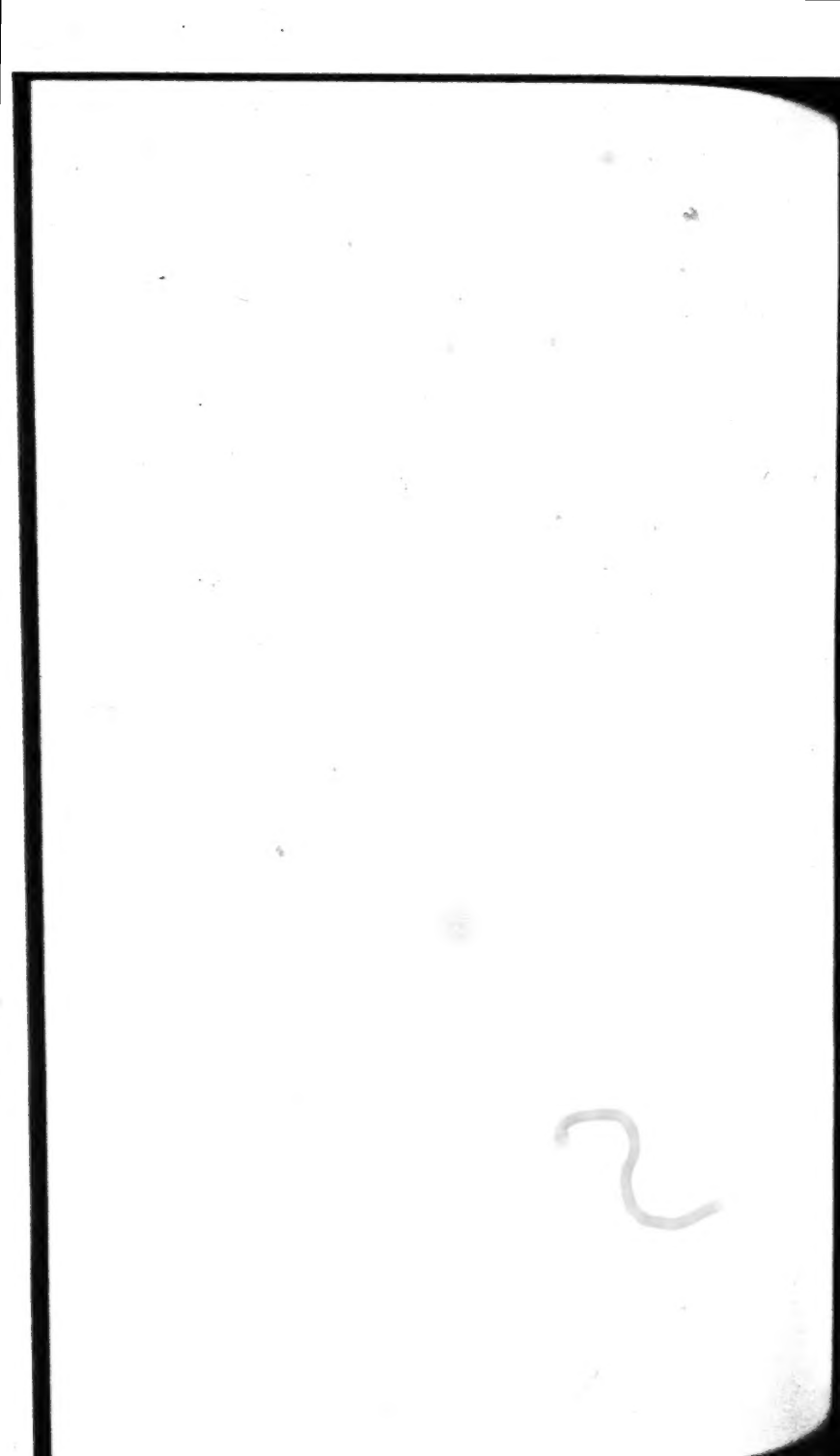

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 73-804

GEORGE P. BAKER, RICHARD C. BOND, and JERVIS LANGDON, JR., TRUSTEES OF THE PROPERTY OF PENN CENTRAL TRANSPORTATION COMPANY, Debtor,

Petitioners,

vs.

GOLD SEAL LIQUORS, INC.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The memorandum opinion and order of the District Court for the Northern District of Illinois, entered March 16, 1972, is unreported and is printed in the Single Appendix (A 35-37). The opinion of the Court of Appeals for the Seventh Circuit, entered August 23, 1973 (A 38-41), is reported at 484 F.2d 950.

JURISDICTION

The judgment of the Court of Appeals was entered August 23, 1973. The petition for certiorari was filed November 20, 1973 and was granted January 21, 1974. The jurisdiction of this Court rests on 28 U.S.C. Section 1254(1).

QUESTION PRESENTED

Whether the orders of the Reorganization Court barring setoffs by creditors of the Debtor precluded the District Court below in a plenary suit brought by Petitioners, from offsetting against the amount found due Petitioners the greater amount found due Respondent and entering a net judgment in favor of Respondent.

STATEMENT OF THE CASE

Petitioners commenced a plenary action on December 22, 1970 in the United States District Court for the Northern District of Illinois to recover unpaid freight charges. Respondent counterclaimed for losses incurred from damage to shipments of merchandise bought by Respondent but delivered by Penn Central. Respondent's damages were almost three times the amount claimed by Petitioners.

The District Court, on the basis of stipulated facts, found Petitioners indebted to the Respondent for $18,016.77, the Respondent indebted to Petitioners for $6,999.76, and entered judgment in favor of Respondent for $11,017.01.

Petitioners appealed to the Court of Appeals for the Seventh Circuit which affirmed the District Court, holding that Order No. 571 of the Reorganization Court, set forth as an Addendum to this brief, did not require the District Court to withhold the full exercise of its jurisdiction in Petitioners' plenary suit in that forum.

ARGUMENT I

THE REORGANIZATION COURT COULD NOT BY SUMMARY JURISDICTION BAR THE DISTRICT COURT FROM GIVING EFFECT TO DEFENDANT'S COUNTERCLAIM.

The Trustees in Argument I of their brief argue that the "exclusive jurisdiction" of the Reorganization Court over the property of the Debtor extends the application of the Reorganization Court's order, entered in summary proceedings, to plenary suits wherever they may be brought.

The exclusive jurisdiction of the Debtor's property, which is summary in nature, pertains only to property over which the Court has actual or constructive possession. The test of this jurisdiction is not title or right, but possession of the Debtor at the time of the filing of the petition. *Thompson* v. *Magnolia Petroleum Co.*, 309 U.S. 478, 481 (1940).

The bankruptcy court is without summary jurisdiction to determine adverse claims to property not in the possession of the debtor or its trustees, and an action to recover on such claims may be brought only in courts where the bankrupt-debtor could have litigated the question. *First National Bank of Chicago* v. *Chicago Title & Trust Co.*, 198 U.S. 280, 289 (1904).

Property or money held adversely to the bankrupt-debtor can only be recovered in a plenary suit and not by summary proceeding. *Gailbraith* v. *Vallely*, 256 U.S. 46 (1920); *First National Bank of Chicago* v. *Chicago Title & Trust Co., supra; Louisville Trust Co.* v. *Comingor*, 184 U.S. 18 (1901); cf. *May* v. *Henderson* 268 U.S. 111, 115 (1925).

The assertion of a right of setoff deprives the Reorganization Court of summary jurisdiction to determine the issues raised and requires a plenary hearing in the appropriate form. Where a respondent assets a substantial claim of setoff against that which is sought by the trustee, an adverse claim is raised that can be adjudicated only in a plenary action. *In re Chicago and Northwestern Ry.*, 86 F.2d 508 (7th Cir. 1936). 4 Collier Bankruptcy (14th Ed.) ¶68.20 [4] p. 945. Nor is a claim by the debtor against a third person "property" of the debtor which will support summary proceedings in the reorganization court to collect the debt. *Duda* v. *Sterling Mfg. Co.*, 178 F.2d 428, 435 (8th Cir. 1949); *In re Standard Gas & Electric Co.*, 119 F.2d 658, 661-62 (3rd Cir. 1941); *Thompson* v. *Terminal Shares*, 104 F.2d 1, 9 (8th Cir. 1939) *cert. denied* 308 U.S. 559 (1939); *In re Roman*, 23 F.2d 556 (2nd Cir. 1928).

Only if a third party has money, which is the property of the debtor which it merely colorably retains, can the Reorganization Court exercise summary jurisdiction. *Taubel-Scott-Kitzmiller Co., Inc.* v. *Fox*, 264 U.S. 426 (1923); *May* v. *Henderson*, 268 U.S. 111, 115 (1925). Here the position of the defendant Gold Seal Liquors, Inc. has at all times been that of an adverse claimant with a substantial and not merely colorable defense. The claim of the debtor, constituting a chose of action in this case, cannot be said to be property not subject to an adverse claim and hence within the reach of the summary procedure of the Reorganization Court.

The comments of Judge Learned Hand in *In re Roman*, 23 F.2d 556 (2d Cir. 1928) at p. 558, reversing an order entered summarily, directing payment of the bankrupt's debtor are pertinent:

"Nobody can maintain that, before the payment is made, the bankrupt has any property in the syndicate's hands. Even though its refusal were no better than colorable, its property remained its own; it had only broken its promise, and like any other promisor, was liable to an action for damages. Thus, not only is the order a decree of specific performance, where no such remedy exists, but it ignores the distinction between the obligation to perform and the consequences of performance. It would not be permissible to collect even a bank deposit due a bankrupt by these means. So far as possession can be imputed to such property at all, it is confined to the rights of the bankrupt to enforce the promise. The trustee must proceed as the bankrupt must have proceeded, in a court having competent jurisdiction in such causes."

The distinction between the Reorganization Court's power to decide conflicting claims of ownership of the Debtor's chose in action, of which none exist in this case, and the power to adjudicate the claim of the Debtor against Gold Seal, which it did not have, is expressed in *In re Lehigh and Hudson River Ry.*, 468 F.2d 830 (2d Cir. 1972). The reorganization court in that matter entered an order approving the petition for reorganization of the Lehigh Railroad. Paragraphs 10 and 11 of the order were substantially the same as Paragraphs 9 and 10 respectively, of Order No. 1 entered in the Penn Central reorganization (A 31). Penn Central nevertheless, in disregard of the orders of the reorganization court, set off and applied the sums it was obligated to pay Lehigh against Lehigh's indebtedness to it. In response to an order to show cause, Penn Central asserted that the facts relating to the account presented "a substantial adverse claim as to the Petitioner's entitlement to the amount sought, and the Court is therefore without jurisdiction to enter the order sought in a summary proceeding." On

appeal by Penn Central, from an order enjoining and restraining the Penn Central trustees from failing to honor drafts submitted by Lehigh for interline freight balances and overcharge claims, the order was vacated, without prejudice to the bringing of a plenary suit. Chief Judge Friendly at page 433 first corrected a misconception of the Lehigh Railroad, which Penn Central appears to share in this case:

> "At the outset, it is well to correct a misconception resulting from Lehigh's reliance on the statement in 2 Collier, Bankruptcy ¶23.05 [4], at 485 (1971), cited by the district court:
>
> > 'Where the character of the property is such that it is not capable of tangible or actual physical custody, constructive possession will suffice to confer summary jurisdiction upon the bankruptcy court regarding such property.'
>
> "The discussion makes clear that this statement refers to conflicting claims of the bankrupt and others to the *ownership* of such intangibles; in such cases the rule with respect to choses in action is the same as that with respect to tangible property. But, as is explained in the final sentence of the subsection, *id.* at 489-90, and the cases cited in fn. 33, the bankruptcy court does not have summary jurisdiction to *enforce* a chose in action against the bankrupt's obligor, even when the bankrupt's rights seem clear. Judge Learned Hand made the distinction, with his customary clarity, in *In re Roman*, 23 F.2d 556 (2 Cir. 1928)."

Judge Friendly further noted on page 434:

> ". . . The injunction against setoff is strong medicine. With some insolvent railroads in truly desperate conditions it may mean that the holder of a claim, who would have had the finest kind of security in ordinary bankruptcy, will be totally deprived of it since even

the priority accorded by *In re New York, N. H. & H. R. R. Co.*, 147 F.2d 40 (2 Cir.), cert. denied, *Commonwealth* v. *New York, N. H. & H. R. Co.*, 325 U.S. 884, 65 S.Ct. 1577, 89 L.Ed. 1999 (1945), may prove to be worthless. Phrasing the question in a case like this in terms of a violation of the order approving the petition should not veil the reality that, in practical effect, the reorganization court is ordering an obligor to pay something which he has substantial grounds for contending he no longer owed when the petition was approved."

Ex Parte Baldwin, 291 U.S. 610, 618 (1934) holds that the exclusive jurisdiction of the bankruptcy court is determined by the "main purpose" of the suit.

The main purpose of the action below was to collect freight charges from the defendant shipper who was outside the jurisdiction of the reorganization court and who could be joined only in a plenary suit. The jurisdiction of the reorganization court was at best concurrent and not exclusive, though it is questionable whether the Reorganization Court ever had jurisdiction over Gold Seal to collect the freight claim. The amount and extent of the Debtor's claim against Gold Seal cannot be determined without considering the shipper's counterclaim. The counterclaim meets squarely the claim for which the debtor sought judgment below.

This court said in *Thompson* v. *Texas Mexican Ry.*, 328 U.S. 134 (1946) at 138, that litigation restricted to the amount due under a contract, expressed or implied, does not interfere with the administration of the estate. Neither did the judgment entered below have such an effect, for any excess of the counterclaim over the amount of the debtor's claim must be presented to the bankruptcy court for proof and allowance.

Had Gold Seal consented in any way to the jurisdiction of the Reorganization Court, the Trustees' position would be stronger. It cannot be said, however, that Gold Seal was within the summary jurisdiction of the Reorganization Court. Gold Seal never filed a claim in the reorganization proceeding, though a claim was filed by Penn Central on behalf of Gold Seal on the basis of the amount of the shipper's freight claims as shown on the records of the Debtor as of February 1, 1971. Jurisdiction to adjudicate and collect the Debtor's freight claim against Gold Seal was acquired only by the District Court for the Northern District of Illinois in the plenary suit commenced by the Trustees.

The Trustees' position is an attempt to extend summary jurisdiction over courts adjudicating plenary suits where such suits are required for the collection of the Debtor's accounts receivable. The summary jurisdiction of the Reorganization Court is defined and limited by the Bankruptcy Act, and neither the Reorganization Court nor the Trustees appointed by it can go beyond the limitations therein prescribed.

ARGUMENT II

THE ORDERS OF THE REORGANIZATION COURT BY THEIR TERMS DID NOT BIND THE DISTRICT COURT FROM ENTERING ITS JUDGMENT.

Both the pertinent provisions of Order No. 1, paragraphs 9 and 10 (A 31) and Order No. 571, (1a)[1] did not operate to restrain judicial action in giving effect to counterclaims adjudicated in plenary suits. Both orders are directed against non-judicial setoffs, of the kind sought to be avoided in the cases cited by the Trustees. The distinction between non-judicial setoffs by creditors

resorting to self-help and the action of the District Court for the Northern District of Illinois, is crucial.

This distinction is set forth at length in the *Southeastern Michigan Shippers Cooperative* case, (Petitioner's Brief, p. (B 5), and is relevant to an analysis of the orders of the Reorganization Court which the Trustees claim were erroneously disregarded by the District Court below.

The Trustees have cited at page 7 of their brief the so-called Shipper's Set-Off case, *In re Penn Central Transportation Co.*, 339 F. Supp. 603 (E.D. Pa. 1973), affirmed 477 F.2d 841 (3d Cir. 1973). The same decision is cited by the Michigan court (B 9) in support of the proposition that the Penn Central Reorganization Court may and had power to enjoin or prevent another District Court from setting off one judgment against another. A careful examination of both opinions indicates that the case is not authority for the sweeping rule attributed to it.

In that case the Trustees filed a petition in the Reorganization Court for an order directing certain shippers to pay amounts due the Debtor. The Court noted first two principal issues raised by the petition—the extent of the Court's summary jurisdiction to control the right to resort to the remedy of set-off, assuming the existence of jurisdiction under the circumstances, the propriety of continuing the existing restraints against set-off. The Court found first under the circumstances the existence of summary jurisdiction over choses in action because of the lack of a substantial dispute concerning the ownership of the chose in action.

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[1] The order entered pursuant to the Reorganization Court's opinion in 339 F. Supp. 603 is not reported. It is printed as an Addendum to this brief, page 1a hereof.

The Court characterized the various respondent shippers before it in the proceeding and placed them into four categories:

The first category consisted of shippers who allegedly overpaid bills or mistakenly paid erroneous or duplicate bills. The Court found no summary jurisdiction as to these parties without their consent.

The second class consisted of shippers who contended that the debtor retained the proceeds of salvaged goods. Summary jurisdiction was not found here.

The third class consisted of shippers who contended that there was an agreed settlement of mutual accounts between the debtor and the shipper. As to these the Court found summary jurisdiction and stated that the off-setting accounts of these shippers were incapable of being discharged by unilateral set-off or by mutual agreement.

The fourth group of respondents were not shippers but companies which exchanged goods or services with the debtor not involving the carriage of freight where there was alleged the existence of contractual arrangements under which the parties would from time to time net out mutual debts and credits. As to these parties the Court found it lacked summary jurisdiction.

In none of these classes can the present defendant Gold Seal Liquors, Inc. be placed. Aside from the fact that Gold Seal was not only not before the Court and was not bound therefore by Order 571, it could not be said to belong to any classification of creditors made by the Court in its opinion.

One should examine the actual order entered on January 31, 1972, the so-called "Order 571," to determine its scope without regard to the dicta in the District Court's

opinion delivered simultaneously with the entry of the order. The order consists merely of one paragraph[1], and reads simply that all persons, firms and corporations served with a copy of said petition are enjoined until further order of the court from setting off or attempting to set off obligations due and owing to the debtor on account of charges for services of carriage any claim or claims which they may have against the debtor arising prior to June 21, 1970. It should be noted first that the order applies only to persons, firms and corporations served with a copy of the petition. Gold Seal Liquors was not so served or named therein. It should be further and finally noted that the court's injunction was against setting off or attempting to set off obligations due and owing to the debtor by the exercise of self-help, by non-judicial set-off, and not by the maintenance and prosecution or even an allowance of a counterclaim in a plenary judicial proceeding. The Reorganization Court should not be charged with an attempt to enjoin all courts from entertaining counterclaims whether or not jurisdiction exists. Such an attempt would be an unwarranted and ineffectual attempt to extend the jurisdiction of the Reorganization Court, unsupported by the Act of Congress.

That such is not the case is indicated by the characterization of the holding by the Court of Appeals for the Third Circuit, 477 F.2d 841 (3d Cir. 1973).

At page 843 of 477 F.2d, Chief Judge Seitz stated:

> "The basic issue presented on this appeal is whether a reorganization court in a §77 proceeding has *summary jurisdiction to enjoin a non-judicial set-off* of claims for goods, services, and shipping losses and damages against freight charges, where such set-offs

[1] See Addendum to Respondent's brief.

were effected prior to the Debtor's filing for reorganization." (Emphasis supplied).

The matter before this Court involves not a non-judicial set-off but the allowance and recognition of the defendant's counterclaim by the District Court in Illinois in the plenary action brought by the Trustees in that forum.

The Trustees apparently place great weight on the memorandum opinion of the District Court for the Eastern District of Michigan, set forth in full in their brief here (B1-B5, incl.), in the case between the Trustees as plaintiffs and *Southeastern Michigan Shippers Co-Operative Association* as defendant. That opinion should not be controlling here for reasons hereinafter set forth.

The Michigan court's opinion is divided into two parts, one dealing with the defense of accord and satisfaction (B1-B6) and the balance (B6-B15) treating the matter of the defendant's counterclaim. No mention need be made of the first part of the opinion except to note the recognition by the Michigan court at page B5 of the distinction between judicial and non-judicial set-offs.

In considering the question of the defendant's recovery on its counterclaim, the Michigan court first decided that it could not allow any recovery on the counterclaim for reasons which do not appear to be significant. The court mentioned first the provisions of 11 USC Section 205 (a) which granted to the court approving the petition for reorganization as property filed, "exclusive jurisdiction of the debtor and its property wherever located . . ." From this the court found in paragraph 5 of the order approving the petition (Order No. 1) a prohibition against allowing the shipper's counterclaim, if proved, to affect any judgment entered on behalf of the debtor. At the outset it must be noted that the claim of the debtor against the

shipper in *Southeastern* was undisputed, whereas the amount claimed by the Trustees against Gold Seal Liquors, Inc. was in dispute (Petitioner's brief, p. 11). The dispute as to the amount owed and the amount claimed by Gold Seal from Penn Central in this case raised an adverse claim as to any chose in action consisting of Penn Central's claim against Gold Seal, thus requiring adjudication in a plenary suit.

Paragraph 5 of Order No. 1 of the Reorganization Court authorizes the Debtor Penn Central to institute or prosecute suits in other courts to liquidate, compromise, adjust or make settlement of its claims and to defend, liquidate and settle suits against it. Paragraph 5 further prohibits the Debtor from making any payment pursuant to any court order or settlement without further order of the Reorganization Court. Paragraph 5 of Order No. 1 does not restrict a district court having jurisdiction of the parties and of the subject matter in a plenary suit from proceeding to adjudicate the issues and entering a judgment as the District Court in this case did below.

The Michigan court then decided that the counterclaim could be adjudicated but that any judgment on the counterclaim could not be applied against any amount found to be due Penn Central from the shipper. The Michigan court felt that it was precluded from setting off the counterclaim by paragraph 9 of Order No. 1 of the Reorganization Court. Actually, all Order No. 1 purports to do in this regard, is to restrain individuals within the summary jurisdiction of the court from interfering with the property of the Debtor (paragraph 9) or resorting to self-help by foreclosing on collateral or setting off claims against the Debtor (paragraph 10). If the order

sought to bind other courts having plenary jurisdiction over adverse claims, it is submitted that Order No. 1 did not have such effect.

The Reorganization Court in Philadelphia is without power to control by its order the District Court in Illinois in the adjudication of a plenary suit in the Illinois court.

The question of the effect of an adverse claim on the Debtor's chose in action is not treated in the Michigan opinion. An adverse claim, made in good faith, operates to entitle the adverse claimant to a hearing in a plenary suit rather than to be subjected to a decision by summary jurisdiction of the reorganization court.

Order No. 571, insofar as it could be said to have been intended to bind the Illinois court, or other courts entertaining plenary suits, and there is no indication that such was the intention, would not be a proper or reasonable exercise of summary jurisdiction.

The jurisdiction of the bankruptcy court is not exclusive if plenary jurisdiction exists. The Reorganization Court could not enforce its order against this shipper by proceedings in that court on the claim.

The right of set-off is not inapplicable, as a matter of law, in reorganization proceedings. The ultimate determination is based upon the equities involved under the particular fact situation presented. The Trustees in this case have presented little evidence which would justify a court to determine the facts upon which that necessary legal conclusion must be based that set-off should be denied.

In *Lowden* v. *Northwestern Nat'l. Bank & Trust Co.*, 298 U.S. 160 (1936), the Court held that the provisions of §68 of the Bankruptcy Act recognizing the act of set-

off in proceedings under the Act do not apply automatically in §77, Reorganization Proceedings. The Court mentioned various factors which must be considered in determining if a creditor is to be denied the right of set-off, or if the general equity and bankruptcy rule allowing set-off is to be followed. Although the Court stated that §68 does not automatically apply in reorganization proceedings, it did not hold that §68 never applies to reorganization proceedings; on the contrary, the Court made clear that if set-off was not allowed, it would result in an exception to the general rule in equity and bankruptcy proceedings.

In *Susquehanna Chemical Corp.* v. *Producers Bank & Trust Co.*, 174 F.2d 783 (3d Cir. 1949) the Court concluded that whether the right of set-off applies in reorganization proceedings under Chapter X depends upon the facts presented and the equities of the particular case. *Chase Nat'l Bank v. Lyford,* 147 F.2d 273 (2d Cir. 1945) held that the right of set-off exists in §77 unless the creditor is estopped to assert this right against certain priority creditors.

The right of a creditor to effect a set-off is well founded in the common law. Section 68 recognizes the injustice which would result if a creditor is compelled to pay in full his debt to the estate while being limited to a percentage payment of his claim against the Debtor. See 4 Collier Bankruptcy (14th Ed.) ¶68.02 (1), p. 853. The hardship and inequity of such a procedure is obvious and the effect of such a rule is apparent. The enforcement of such a doctrine might well not result in the rehabilitation of the debtor but would nevertheless cause severe financial damage to those creditors who are subjected to substantial losses for the benefit of other creditors of the

debtor. To employ such an extraordinary remedy the trustees must demonstrate clearly and unequivocally the need that such drastic relief be had, outweighing the obvious harm to the shipper. This, the trustees have not done, especially since no feasible plan for the resuscitation of the Debtor has been brought forth after forty-five months of reorganization proceedings.

ARGUMENT III

THE JUDGMENT OF THE DISTRICT COURT IS PROPER, JUST AND EQUITABLE UNDER THE FACTS OF THIS CASE.

The Trustees portend the most serious consequences if the decision of the Court of Appeals below is not overturned. Specifically, they state that there are "several other suits pending in the courts of the Seventh Circuit" which would be governed by the decision below, which unless reversed, would result in claimants sued in the Seventh Circuit "receiving a clear preference over all other claimants with similar claims."

An examination of the files of both of the Office of the Clerk of the United States District Court for the Northern District of Illinois at Chicago and the Office of the Clerk of the Circuit Court of Cook County, Illinois, also located at Chicago, indicates at most three involving counterclaims cases, two in the Federal Court, only one of which has a substantial counterclaim pleaded and one in the Circuit Court of Cook County. Of the two cases in the District Court, one is in the process of removal to Pennsylvania. It is hard to imagine the serious consequences that will result from the affirmance of the decision of the court below. The Trustees further state that "considerations of practicality and judicial economy" are what compelled them to bring the plenary suit in Illinois.

They then state that "there was a dispute as to the actual amount owing to the Trustees on their chose in action for freight charges", thus indicating a substantial adverse claim requiring adjudication in a plenary suit. The Trustees finally plead that to compel them to recover on every chose in their possession in the Reorganization Court could bring the reorganization proceeding itself to a standstill. The Trustees have the right to litigate in the Reorganization Court where summary jurisdiction exists. Where it does not exist, as in this case, they have no alternative but to bring plenary suits to collect receivables due the Debtor.

In considering whether the judgment recovered by the defendant against the Debtor in the District Court of $11,017.71 should stand, it should be noted that the Debtor is liable for damages to the defendant in an amount more than twice the amount sued for, which at the very least should be applied as a set-off to reduce the claim.

The Trustees argue that the District Court's action below created a preference, discriminatory to other creditors, is similar to the argument advanced by the railroad in *Chicago & Northwestern Ry.* v. *Lindell*, 281 U.S. 14 (1930), that allowing a counterclaim would be a discrimination in favor of a counterclaiming shipper, a collection greater or less or of different compensation than the rates and charges for shipment specified by the carrier in its tariffs. The Court rejected that argument and said that the practice of determining claims of shippers for loss or damage in suits brought by carriers to collect transportation charges was not repugnant to the rule prohibiting the payment of such charges otherwise than in money, that adjudication in one suit of the respective claims of plaintiff and defendant was the practical equiva-

lent of charging a judgment obtained in one action against that secured in another, and that neither was to be distinguished from payment in money. 281 U.S. 17. So in this case the crediting of the amount owed by the shipper against the amount owed by the Debtor is indistinguishable from payment in money by the shipper of the actual amount owed.

The Trustees complain here that if the judgment of the Court of Appeals is affirmed, that they will be faced with a "Hobson's choice," which metaphorically is no choice at all, when seeking to proceed in plenary actions against shippers to whom Penn Central is indebted in an amount greater than the amount of the Railroad's claim. Clearly, the Trustees have a choice in such a situation as any litigant does, namely, to proceed and litigate all matters including those of counterclaim, recovering what they may, or to await the filing of claims by the shippers and litigating the shipper's claims and their own off-setting claims against the shipper's in summary proceedings in the Reorganization Court. In the absence of a filed claim by a shipper, or consent by a shipper to the summary jurisdiction of the Reorganization Court, the Trustees must proceed by a plenary suit, as Congress has so prescribed.

It is a dubious preference which the defendant here is charged with receiving at the hands of the courts below, one, which the defendant Gold Seal Liquors, Inc. would gladly have foregone and one, which is solely the result of the extensive injury inflicted on the shipper by Penn Central. The Trustees should not be permitted to inflict further injury and damage to the shipper. Gold Seal has suffered a sufficient penalty for having patronized Penn Central for the carriage of freight in the period of the carrier's decline.

CONCLUSION

The decision of the Court of Appeals affirming the judgment of the District Court should be affirmed.

Respectfully submitted,

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ADDENDUM

Order No. 571

AND NOW, this 31st day of January, 1972, it is Ordered that the petition of the Trustees for an order directing shippers to pay amounts due Debtor (Document No. 400) is GRANTED IN PART, and all persons, firms and corporations served with a copy of said petition are enjoined, until further order of this Court, from setting off or attempting to set-off against obligations due and owing to the Debtor on account of charges for services of carriage any claim or claims which they may have against the Debtor, arising prior to June 21, 1970, but any such claim or claims may be filed and proved in accordance with Order No. 164 in this proceeding. This Order shall be deemed to be without prejudice to the right of any such shipper to claim such priority as may be proper.

JOHN P. FULLAM
J.